Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1998

RODNEY MAYEUX,
Plaintiff - Petitioner

versus

UNITED STATES ARMY CORPS OF ENGINEERS,
Defendant - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF PLAINTIFF-PETITIONER, RODNEY MAYEUX

Respectfully Submitted:

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Suits in Admiralty Act completely preempt the operation of the Federal Torts Claim Act in a maritime action against the Government which involves *solely* the negligence of a government *employee* and which does *not* involve any government vessels, cargo or property?

II. Did the district court err in granting the respondent's Motion for Summary Judgment when genuine issues of material facts existed as to whether the statute of limitations under the Suits in Admiralty Act was equitably tolled by the actions of the Government which induced the petitioner into allowing the filing deadline to pass?

LIST OF ALL PARTIES

The undersigned counsel of record certifies that the following listed persons are parties to this lawsuit.

1. **Rodney Mayeux - Petitioner**

2. **U.S. Army Corps of Engineers - Respondent**

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Opinion of the United States District Court for the Eastern District of Louisiana in Civil Action No. 96-CV-1304-R rendered on September 26, 1997	Not reported
Opinion of the United States Court of Appeals for the Fifth Circuit in No. 97-31066 entered on July 17, 1998	Not published

STATEMENT OF JURISDICTION

Plaintiff - Petitioner, Rodney Mayeux, originally brought this claim pursuant to the subject matter jurisdiction of the district court based on the Federal Tort Claims Act. (28 U.S.C. 2401, et seq.)

Plaintiff - petitioner, Rodney Mayeux, contends that he was injured by the negligence of an employee of the respondent, United States of America, who unreasonably delayed petitioner's entrance into the Harvey Lock and negligently managed and supervised the mooring operation in the Lock which caused petitioner's injuries.

The district court held that it had subject matter jurisdiction pursuant to the Suits in Admiralty Act 46 U.S.C. 740, et seq.

The U.S. Fifth Circuit Court of Appeals had jurisdiction of the appeal based on 28 U.S.C. 1291.

On September 24, 1997, the United States District Court for the Eastern District of Louisiana rendered an Order granting the respondent's Motion for Summary Judgment and dismissing the petitioner's claim. On September 26, 1997 the United States District Court rendered a final judgment dismissing the petitioner's complaint. On October 16, 1997, Plaintiff - Petitioner, Rodney Mayeux, filed a Notice of Appeal with the U. S. Fifth Circuit Court of Appeals.

On July 17, 1998, the Fifth Circuit Court of Appeals affirmed the Judgment of the U. S. District Court.

Jurisdiction of this Honorable Court is based on 28 U.S.C. 1254.

STATUTES INVOLVED IN CASE

I. 28 U.S.C. 2679 (b) (1) of the Federal Tort Claims Act Provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

II. 28 U.S.C. 2680 (d) provides:

> "Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States."

III. 46 U.S.C. 740 provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury to be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: **Provided,** That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act. **Provided further,** That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

IV. 46 U.S.C. 742 provides:

In cases where if such vessel were privately owned or operated or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam *may* be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the

United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

STATEMENT OF THE CASE

(i) *COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW*

On April 15, 1996, petitioner appellant, Rodney Mayeux, filed a Complaint in the U.S. District Court for the Eastern District of Louisiana, based on the Federal Torts Claim Act (28 U.S.C. 2671, et seq.) for injuries which he alleges to have sustained due to the negligence of an employee of the respondent, United States Corps of Engineers.

On May 20, 1997, the respondent, United States of America, filed a Motion for Summary Judgment contending that petitioner's claim arose in admiralty and was governed by the Suits in Admiralty Act (46 U.S.C. 740, et seq.) Respondent further contended that petitioner's claim had prescribed because it was filed after the expiration of the Suits in Admiralty Act's (herinafter referred to as SAA) two year statute of limitations.

On September 24, 1997, Judge Sarah Vance granted the

respondent's Motion for Summary Judgment and on September 26, 1997, Judge Vance rendered a Judgment dismissing the Complaint of petitioner appellant, Rodney Mayeux.

On October 16, 1997, Petitioner, Rodney Mayeux, filed a Notice of Appeal with the U.S. Fifth Circuit Court of Appeals. On July 17, 1998, the Fifth Circuit Court of Appeals affirmed the Judgment of the district court. It is from this Judgment that petitioner is seeking a writ of certiorari.

(ii) STATEMENT OF FACTS

On or about October 19, 1993, petitioner, Rodney Mayeux, was a passenger on a boat which was approaching the Harvey Canal Locks located in Jefferson Parish, Louisiana and requested permission to pass through the locks from the operator of the locks who was employed by the respondent, United States Corps of Engineers. (Vol. 1,pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

Petitioner and the captain of the boat on which petitioner was a passenger were advised by the lock operator that they would not be permitted to pass through the Harvey Locks until such time as another vessel which was behind the vessel on which petitioner was a passenger would arrive at the Harvey Locks. (Vol. 1, pp. 00282-287; Vol. 1, pp 0006-7; Vol. 2, pp. 313-318)

After waiting for several hours for the other vessel to arrive, petitioner's vessel was instructed to wait until the tugboat with three barges went through the lock first. (Vol. 1, pp. 00282-287; Vol. 1, pp 0006-7; Vol. 2, pp. 313-318)

The operator of petitioner's vessel was instructed by the lock operator to follow the tug and barges through the Harvey Locks in close proximity behind these other vessels. (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

The operator of the petitioner's vessel requested permission to wait until the tug boat and barges had proceeded through the Harvey Locks so that his vessel would be at a safe distance to follow through behind the vessels. (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

This permission was negligently refused by the lock operator who was employed by the respondent, United States Corps of Engineers. (Vol. 1, pp. 00282-287; Vol. 1, pp.0006-7; Vol. 2, pp. 313-318)

The operator of petitioner's vessel was told by the respondent's employee that he must proceed through the Harvey Locks immediately behind the tug and its tow of barges or he would not be permitted to go through the Harvey Locks at all. (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

The operator of petitioner's vessel, following the instructions of the lock operator followed the tug and barges through the lock and the vessel on which petitioner was riding was caught up in a violent wave action and suction caused by the tug boat and barges. (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

As a result of the violent water action of the tug and barges, petitioner, Rodney Mayeux, was tossed about the boat and sustained severe injuries to his neck and back, as well

as amputations of the distal tips of the ring finger and small finger of his left hand. (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

The lock operator who controls the Harvey Locks performs his job *on land* (Vol. 1, pp. 00282-287; Vol. 1, pp. 0006-7; Vol. 2, pp. 313-318)

The tortious conduct of the lock operator was based on land and did *not* occur on navigable water. (Vol. 1, pp. 00282-287; Vol.1, pp. 0006-7; Vol.2, pp. 313-318)

Petitioner Rodney Mayeux, had initially received information that the Harvey Locks were operated by the State of Louisiana, Department of Transportation and Development. (Vol. 1, pp. 8-10; Vol. 2, pp. 313-318)

Accordingly, on July 22, 1994, petitioner filed a lawsuit for his injuries in the 24th Judicial District Court for the Parish of Jefferson against the Louisiana Department of Transportation and Development. (Vol. 1, p. 0023-27)

On September 16, 1994, counsel for the State of Louisiana forwarded to petitioner's counsel a letter from Robert Roth, District Maintenance Engineer for the Louisiana Department of Transportation and Development, advising that the Harvey Locks were not operated by the Louisiana Deparatment of Transportation and Development. (Vol. 1, p. 28-29)

The attorney for the State of Louisiana advised counsel for petitioner that the U.S. Corps of Engineers was believed to be the operator of the Harvey Locks. (Vol. 1, p. 28)

Accordingly, on Ocober 19, 1994, undersigned counsel, on behalf of petitioner, Rodney Mayeux, timely filed a claim with the U.S. Army Corps of Engineers asserting a claim for damages under the Federal Tort Claims Act. (Vol. 1, p. 32)

On November 1, 1994, Lorrine Friedrichs, Claims Officer for the Department of the Army, wrote to counsel for petitioner advising that the Secretary of the Army had administrative authority to settle claims and requesting additional information in order to process the claim for Rodney Mayeux. (Vol. 1, pp. 34-35)

In compliance with Ms. Friedrichs' request, counsel for petitoner forwarded additional information regarding petitioner's claim, including medical records and medical bills to Ms. Friedrichs on December 13, 1994. (Vol. 1, pp. 36-41)

At no time did the Department of the Army ever deny the claim submitted on behalf of the petitioner, Rodney Mayeux. (Vol. 1, pp. 34-35; p. 42)

On January 30, 1996, counsel for petitoner spoke to Ms. Friedrichs by telephone inquiring as to the status of the progress on the petitioner's claim submitted to the Department of the Army. (Vol. 1, p. 42).

Ms. Friedrichs again did *not* indicate that petitioner's claim had been denied, but merely advised that the claim was above the monetary jurisdiction of the U.S. Corps of Engineers New Orleans District. (Vol. 1, p. 42)

She further advised that the claim had been forwarded to the office of the Judge Advocate General for adjudica-

tion on September 7, 1995, and that the U.S. Army Claims Service should be responding to undersigned counsel shortly. (Vol. 1, p. 42)

Despite Ms. Friedrichs' assertions that the U.S. Army Claims Service would be responding to petitioner's counsel, no response of any kind was forthcoming.

Accordingly, on April 15, 1996, petitioner, Rodney Mayeux, filed a Complaint in the United States District Court for the Eastern District of Louisiana asserting a claim against the Department of the Army, United States Corps of Engineers for his damages. (Vol. 2, pp. 282-286)

Petitioner, Rodney Mayeux, and his counsel were never advised by any representative of the respondent, United States of America, prior to Octobaer 13, 1995, that the Federal Tort Claims Act did *not* apply to his cause of action. (Vol. 1, p. 4)

At no time did the respondent or its representatives deny petitioner's claim made under the Federal Tort Claims Act on the basis that petitioner's claim fell within admiralty jurisdiction. (Vol. 1, pp. 34,35; Vol. 1, p. 42)

At no time prior to the institution of his lawsuit did the respondent or its representatives ever advise petitioner that his claim was *not* cognizable under the Federal Tort Claims Act. (Vol. 1, pp. 34-35; Vol. 1, p. 42)

At no time prior to October 13, 1995, did the respondent or its representatives advise petitioner or his attorney that the Federal Tort Claims Act did not apply to petitioner's claim and that suit had to be filed within two years of the accident. (Vol. 1, pp. 34-35; Vol. 1, p. 42)

ARGUMENT

I. DOES THE SUITS IN ADMIRALTY ACT COMPLETELY PREEMPT THE OPERATION OF THE FEDERAL TORTS CLAIM ACT IN A MARITIME ACTION AGAINST THE GOVERNMENT WHICH INVOLVES *SOLELY* THE NEGLIGENCE OF A GOVERNMENT *EMPLOYEE* AND WHICH DOES *NOT* INVOLVE ANY GOVERNMENT VESSELS, CARGO OR PROPERTY?

Petitioner contends that the district court erred in applying the provisions of the Suits in Admiralty Act to petitioner's claim rather that the provisions of the Federal Tort Claims Act since petitioner's injuries were caused *solely* by the negligence of a government employee and did *not* involve any government vessels, cargo or property.

28 U.S.C. 2679 (b) (1) of the Federal Tort Claims Act provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject mattter against the employee or the employee's estate is precluded without regard to when the act

or omission occurred.

On its face 28 U.S.C. 2679 (b) (1) provides an exclusive cause of action under the Federal Tort Claims Act for injuries resulting from the wrongful act or omission of any employee of the Government while acting within the scope of his employment.

However, 28 U.S.C. 2680 (d) provides an exception to the provisions of 28 U.S.C. 2679 for:

> "Any claim for which a remedy is provided by sections 741-742, 781-790 of Title 46, relating to claims or suits in admiralty against the United States."

46 U.S.C. 740 provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury to be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: **Provided,** That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive

remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: **Provided further,** That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

46 U.S.C. 742 further provides:

In cases where if such vessel were privately owned or operated or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam *may* be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Petitioner, Rodney Mayeux, asserts that the personal injuries suffered by him were not caused by a vessel, property, or cargo owned or operated by the United States, rather his injuries were caused solely by the negligence of the lock operator who was employed by the resondent, United States of America. It was no vessel, property, or cargo owned by the United States that caused petitioner's injuries; rather, it was the negligence of the lock operatcr in his actions of unreasonably delaying petitioner's entrance into the Lock and negligently managing and supervising the mooring operation in the Lock that caused petitioner's injuries.

Petitioner contends that when no vessel, property, or cargo owned by the United States is involved in causing injury, then it is appropriate to apply the Federal Tort Claim Act, which specifically provides a remedy for personal injuries arising from the negligent or wrongful act or omission of any *employee* of the Government while acting within the scope of his office or employment, rather than the Suits in Admiralty Act.

Counsel for petitioner asserts that when the U.S. Fifth Circuit first addressed a similar issue in *McCormick v. United States,* 645 F.2d 299 (5th Cir. 1981), the Court held that the 1960 Amendments to the Suits of Admiralty Act were not intended to modify the scope of the district court's existing jurisdiction over maritime torts at law under the Federal Torts Claim Act.

The Court, in *McCormick v. United States,* 645 F.2d 299 (5th Cir. 1981) held:

More importantly, cases which give every

appearance of an ordinary tort should not, for their maritime character alone, be relegated to the more obscure shipping acts.

Counsel for petitioner is aware that the U.S. Fifth Circuit Court of Appeals re-visited this issue on rehearing in *McCormick v. United States*, 680 F.2d 345 (5th Cir. 1982) and concluded that its prior holding was in error.

However, counsel for petitioner asserts that under the unique facts of the case before this Court, the reasoning of the first *McCormick* decision should apply to the facts of this case.

In the *McCormick* case, the petitioner was injured when his boat struck an unmarked piling which was allegedly unlawfully placed and constructed by the U.S. Army. Thus the facts in *McCormick* involved an injury to petitioner caused by *property* owned by the United States.

Unlike the *McCormick* case, the injuries to petitioner in this case stem from pure negligent *actions* on the part of a government employee and involve *no* government property, cargo or vessel.

Counsel for petitioner asserts that the unique factual circumstances of petitioner's injuries in this case would render his claim cognizable under the Federal Tort Claims Act rather than the Suits in Admiralty Act.

Petitioner's claim is factually more similar to the case of *Collins v. United States Department of Army*, 626 F. Supp. 526 (W.D. Pa. 1985), which involved an injury which occured

by reason of the movement of a vessel into the lock in the course of navigation.

The Court, in *Collins, supra,* held:

> However, 28 U.S.C. 2679 (b) may be viewed as providing an exclusive statutory remedy for personal injury or death caused by negligence of government employees thus superseding the operation of admiralty jurisdiction *in that type of case.*

Collins, supra, at p. 539. (Emphasis added.)

Likewise, in the case before this Court, the petitioner would argue that because no government vessel, property, or cargo was involved in causing his injuries, the Federal Tort Claims Act rather than the Suits in Admiralty Act should apply.

Undersigned counsel is aware that most courts, including the Fifth Circuit, have held that the SAA applies to all maritime tort claims against the United States where the petitioner would have an action in admiralty were the respondent a private person rather than the government.

However, undersigned counsel would urge this Honorable court to re-consider this issue and apply the reasoning of the first decision rendered by the United States Fifth Circuit Court of Appeals in *McCormick v. United States,* 645 F.2d 299 (5th Cir. 1981) particularly in light of the *unique* factual circumstances of this case which involved *solely* the negligence of a government employee and did *not* involve any vessel, property, or cargo owned by the Government.

A review of the 1960 Amendment to the SAA which added the confusing language, "or if a private person or property were involved," indicates that Congress did not intend to completely preempt the operation of the Federal Torts Claim Act in a maritime action against the Government which involved *solely* the negligence of a government employee and which did *not* involve any government vessels, cargo, or property.

As stated by the Fifth Circuit Court in its first *McCormick* opinion, at 645 F.2d 300:

> The ultimate question is whether Congress intended, by the 1960 amendments to the SAA, to bring all maritime torts against the United States within the scope of that Act. Our examination of the history of the SAA, both as originally enacted and as it was amended in 1960, indicates quite clearly that Congress had no such intent.

As explained in the first *McCormick* opinion:

> The 1960 amendment to the Suits in Admiralty Act...was an outgrowth of severe jurisdictional problems facing the petitioner with a maritime claim against the United States. Both the Suits in Admiralty Act and the Public Vessels Act authorized suits on the admiralty side of the district court, and were viewed as providing the exclusive remedy for claims within their coverage....
>
> A petitioner with a contract claim against the United States for more than $10,000 often found

> himself in a difficult position. He had to choose between proceeding in the district court under one of the admiralty Acts, and proceeding in the Court of Claims under the Tucker Act, [28 U.S.C. 1346(a)(2), 1491.] And he had to choose his forum wisely, for cases were not transferrable between the district courts and the Court of Claims, *and an incorrect choice could result in the applicable statute of limitations having run by the time the error was discovered.*

McCormick, 645 F.2d 303-304 (5th Cir. 1981) (Emphasis added.)

To interpret the 1960 Amendment to allow the SAA to preempt the FTCA for *all* maritime claims would create the exact confusion and harsh consequences of misfilings that the 1960 Amendment itself was seeking to ameliorate. Such an interpretation would cause confusion for a petitioner in attempting to choose the correct statute under which to proceed where, as in the case before this Honorable Court, it may not be clear whether petitioner's claim falls within admiralty jurisdiction or not. If petitioner chooses incorrectly, the applicable statute of limitations may have run by the time the issue of whether the claim arises in admiralty or not has been determined. This is precisely the type of confusion that the 1960 Amendment was seeking to avoid.

Congress' intent in passing the amendment in 1960 was to expand the jurisdiction of the district court under the SAA in order to eliminate the confusion over the jurisdiction between the district court and the Court of Claims. It was not Congress' intent to expand the scope of one remedy (SAA) at the expense of another (FTCA) when both remedies were within the exclusive jurisdiction of the district courts.

By the 1960 amendments, Congress sought to clear up confusion and uncertainty and to ameliorate the harsh consequences of misfilings between the district courts and the Court of Claim. It did not intend to expand the scope of the SAA at the expense of the FTCA when both remedies were already within the exclusive jurisdiction of the district courts.

Petitioner-appellant contends that the 1960 Amendment to the SAA was not intended to change the requirement of a vessel owned by or in possesssion of or operated by or for the United States.

In reviewing the statutory context of the amendment, the Court in *J. W. Petersen Coal and Oil Co. v. United States,* 323 F. Supp. 1198 (N.D. Ill. 1970) noted:

> The full title of the chapter embracing 46 U.S.C. 742 is Suits in Admiralty By or Against Vessels or Cargoes of United States. The amended 46 U.S.C. 742, itself, still speaks of suits being brought in the district "in which the vessel or cargo charged with liability is found". And 46 U.S.C. 740 speaks of presenting a claim to the "agency owning or operating the vessel" involved.

Petitioner appellant thus contends that an action like the one before this Honorable Court which involves no government vessel, cargo, or property, is not congnizable under the SAA and would be within the scope of the Federal Torts Claim Act.

As the Court in *Ira S. Bushey & Sons, Inc. v. United States,* 276 F. Supp. 518 (E.D. N.Y. 1967), reversed on other grounds, 398 F.2d 167 (2nd Cir. 1968) noted:

> "Maritime torts of employees of the United States, as distinguished from the torts of vessels of the United States, were intended to be covered by the Federal Tort Claims Act."

Likewise, the tort alleged in this case which resulted *solely* from the negligent *actions* of a government employee and which did not involve any government vessel, cargo, or property was properly intended to be covered by the Federal Tort Claims Act.

II. DID THE DISTRICT COURT ERR IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WHERE GENUINE ISSUES OF MATERIAL FACTS EXISTED AS TO WHETHER THE STATUTE OF LIMITATIONS UNDER THE SUITS IN ADMIRALTY ACT WAS EQUITABLY TOLLED BY THE ACTIONS OF THE GOVERNMENT WHICH INDUCED PETITIONER INTO ALLOWING THE FILING DEADLINE TO PASS?

Petitioner contends the district court erred in granting the respondent's Motion for Summary Judgment thereby dismissing petitioner's claim when the record construed in the light most favorable to the non-moving party demonstrated genuine issues of material fact existed as to whether the statute of limitations was equitably tolled by the actions of the Government which induced petitioner into allowing the filing deadline to pass.

Equitable tolling is allowed in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the

complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Irwin v. Dept. of Veterans Affairs,* 111 S.Ct. 453 (1990).

Petitioner, Rodney Mayeux, contends that the circumstances of this case give rise to both situations alluded to by the U.S. Supreme Court in which equitable tolling was allowed.

In this case, petitioner had actively pursued his judicial remedies by filing a defective pleading during the statutory period when he initially filed suit in state court on July 22, 1994, naming the Louisiana Department of Transportation and Development as a respondent. This lawsuit was filed approximately nine months after the incident occurred, well within the two year statutory period established by the Suits in Admiralty Act. This lawsuit, although timely filed, had named an erroneous party because petitioner was provided incorrect information as to the identity of the employer of the individual who operated the Harvey Locks on the date in question.

On September 16, 1994, counsel for the State of Louisiana forwarded to petitioner's counsel a letter from Robert Roth, District Maintenance Engineer for the Louisiana Department of Transportation and Development, advising that the Harvey Locks were not operated by the Louisiana Department of Transportation and Development (Vol. 2, pp. 28-29)

The attorney for the State of Louisiana advised counsel for petitioner that the U.S. Corps of Engineers was believed to be the operator of the Harvey Locks (Vol. 1, p. 28)

Accordingly, on October 19, 1994, undersigned counsel on behalf of the petitioner, Rodney Mayeux timely filed a claim with the U.S. Army Corps of Engineers asserting a claim for damages under the Federal Tort Claims Act. (Vol. 1, p. 32)

Petitioner-appellant, Rodney Mayeux, asserts that he was induced by the conduct of the respondent-appellee, United States of America, into allowing the two year filing deadline under the SAA to pass without filing his lawsuit against the respondent.

On November 1, 1994, Lorraine Friedrichs, Claims Officer for the Department of the Army, wrote to counsel for petitoner advising that the Secretary of the Army had administrative authority to settle claims and requesting additional information in order to process the claim for Rodney Mayeux.

The letter from Ms. Friedrichs advised petitioner of the limitations period regarding the authority of the Department of the Army to *settle claims,* but it never advised petitoner-appellant that his reliance upon the Federal Tort Claims Act and its limitations period was misplaced or, more importantly, that suit had to be filed within two years of the accident. It only advised petitioner of the limitations period of the Department of the Army to administratively *settle* claims and requested additional information in order to process petitioner's claim. Petitioner was thus induced into believing that his claim was properly filed and was being processed through the proper channels.

In compliance with Ms. Friedrichs' request, counsel

for petitioner forwarded additional information regarding petitioner's claim, including medical records and medical bills to Ms. Friedrichs on December 13, 1994. (Vol. 1, pp. 34-35; p. 42)

On January 30, 1996, counsel for petitioner spoke to Ms. Friedrichs by telephone inquiring as to the status of the progress on the petitoner's claim submitted to the Department of the Army (Vol. 1, p. 42)

Ms. Friedrichs again did *not* indicate that petitioner's claim had been denied but merely advised that the claim was above the monetary jurisdiction of the U.S. Corps of Engineers New Orleans District. (Vol. 1, p. 42)

She further advised that the claim had been forwarded to the office of the Judge Advocate General for adjudication on September 7, 1995 and that the U.S. Army Claims Service should be responding to undersigned counsel shortly. (Vol. 1, p. 42)

Despite Ms. Friedrichs' assertions that the U.S. Army Claims Service would be responding to undersigned counsel shortly, no response of any kind was forthcoming.

Accordingly, on April 15, 1996, petitioner, Rodney Mayeux, filed a Complaint in the U.S. District Court for the Eastern District of Louisiana asserting a claim against the Department of the Army, United States Corps of Engineers for his damages. (Vol. 1, pp. 282-286)

Petitioner-appellant, Rodney Mayeux, and his counsel were never advised by any representative of the respondent,

United States of America, prior to October13, 1995, that the Federal Tort Claims Act did *not* apply to his cause of action nor did the respondent of any of its representatives at any time *deny* petitioner's claim made under the Federal Tort Claims Act on the basis that petitioner's claim fell within admiralty jurisdiction. Had the respondent promptly denied petitioner's claim udner the Federal Tort Claims Act or notified petitioner that his claim fell under the Suits in Admiralty Act and suit was required to be filed within two years, petitioner would have timely filed an action under the SAA.

Instead, respondent lulled petitioner and his counsel into believing that his claim was being administratively processed and evaluated for settlement until the statute of limitations under the SAA had expired.

Petitioner's counsel cooperated fully with providing the Claims Officer for the respondent with all information requested by the Claims Officer. In fact, as late as January of 1996 the Claims Officer for the respondent did *not* indicate that petitoner's claim was denied under the Federal Tort Claims Act or was time barred but rather indicated that the claim had been forwarded to the office of the Judge Advocate General on September 7, 1995 and the "United States Army Claims Service should be responding to you shortly."

At no time did the respondent advise petitioner or his representative that petitioner's claim under the Federal Tort Claims Act was being denied or that suit had to be filed within two years of his accident.

Instead, the respondent continuously processed peti-

titioner's claim requesting additional information from petitioner and leading petitioner to believe that his claim was being administratively processed.

In *Glus Brooklyn Eastern District Terminal*, 795 S.Ct. 760 (1959), the Court held:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.

In the case before this Court, the conduct of the respondent in continuing negotiations with petitioner to process his claim coupled with respondent's failure to ever deny the claim on the grounds that it was not covered under the Federal Tort Claims Act lulled petitioner and his counsel into believing in good faith that the claim was being properly processed under the provisions of the Federal Tort Claims Act.

In *Glus v. Brooklyn Eastern District Terminal*, 795 S.Ct. 760 (1959), the Court held:

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

In *Northern Metal Co. v. United States* 350 F. 2d 833 (U.S. App 3rd Cir. 1965) the Court held that the limitations time under the Suits in Admiralty Act was suspended while the controversy over an alleged overcharge on a contract was administratively pending.

In so holding the Court stated:

> Since the Government through its contracting officer and the Armed Services Board of Contract Appels not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceedings.

Likewise in the case before this Court, the respondent was aware of the petitioner's claim as early as October 19, 1994, when the administrative claim was filed by petitioner pursuant to the Federal Tort Claims Act. Similarly, in the case before this Court, the respondent was actively engaged in deciding petitioner's claim on its merits as is evidenced by the correspondence from respondent's Claim Officer requesting additional information in order to process the petitioner's claim and in forwarding the claim to the Office of Judge Advocate General after determining that petitioner's claim was above the monetary jurisdiction of the U.S. Army Corps of Engineers, New Orleans District. Thus, petitioner asserts that a factual issue exists as to whether the limitations time under SAA was suspended during the pendency of the administrative proceedings.

The U.S. Fifth Circuit Court of Appeals addressed a situation similar to the one before this Court in *McCormick*

v. United States, 680 F. 2d 345 (U.S. App. 5th Cir. 1982)

In *McCormick* the petitioner was operating a small pleasure boat which struck an unmarked piling which was constructed by the U.S. Army. Petitioner timely submitted a claim to the U.S. Army under the Federal Tort Claims Act. More than two years after the accident, the U.S. Army denied petitioner's claims on the grounds that administrative authority to settle the claim had expired on the second anniversary of the accident. Petitioner thereafter filed a Complaint in federal district court alleging jurisdiction under the Federal Tort Claims Act. The government alleged that jurisdiction could only lie under the Suits in Admiralty Act (SAA) and filed a Motion to Dismiss the action because petitioner's complaint was not filed within the two year limitation period prescribed by the SAA.

In reversing the district court's dismissal of petitioner's action, the Court held:

> We hold that the two-year limitation on suits under the SAA can be tolled under appropriate circumstances where to do so would not defeat the purpose of the provision, which is to encourage those with claims against the United States to present their claims promptly and diligently, and where injustice to the petitioner would otherwise result.

Likewise, in the case before this Court, petitioner asserts that the two year limitation under the SAA should be tolled because petitioner's claim against the respondent, United States, were presented promptly and diligently and certainly injustice would result to the petitioner if petitioner's claim was dismissed particularly in light of the respondent's

conduct.

Certainly, issues of material fact existed as to whether the circumstances of this case justify tolling the limitations period.

In ruling on a Motion for Summary Judgment:

> The Court is obliged to review the record and construe the facts in the light most favorable to the non-moving party. All reasonable inferences which can be drawn from the facts must be construed to support the non-moving party's theory of the case and any genuine dispute of fact must be resolved, for purposes of the summary judgment motion, in the non-moving party's favor. *Sanders vs. English*, 950 F. 2d 1152 (5th Cir. 1992)

Based on this standard of review, the district judge committed error in granting the respondent's Motion for Summary Judgment. The district judge erred in making a factual finding that the government did not take any action to deceive or lull petitioner because it notified petitioner that a two year limitation period applied to the Army's settlement authority. (Vol. 2, p. 306)

Petitioner-appellant asserts that advising petitioner that there is a two year period applied to the Army's *settlement authority* is far different from advising petitioner that his claim falls under the SAA and is subject to a two year statute of limitations.

Viewing the correspondence from the respondent to petitioner's attorney in the light most favorable to the

petitioner, it is clear that the respondent lulled petitioner into believing that his claim was being properly processed and evaluated for settlement by the respondent.

In the first *McCormick* decision, at 645 F. 2d at 301-302, Foot note 7, the Fifth Circuit Court of Appeals addressed language in a letter from the Department of the Army which was very similar to the language contained in the respondent's letter in this case and stated:

> We note, however, that such an argument would be most compelling if petitioners could show that they were encouraged in their reliance upon the wrong Act by their dealings with the Government. In this case the denial of the claims by the Department of the Army made clear that petitioners were advised of the limitations period respecting the Department's authority *to negotiate* the *claims*. R. 14-15. There is no indication in the record, however, that the petitioners were ever advised that their reliance upon the FTCA and its limitations period was misplaced and that suit had to be filed within two years of the accident.

Likewise, in the case before this Court, there is no indication in the record that petitioner was ever advised that his reliance upon the FTCA and its limitations period were misplaced or that suit had to be filed within two years of the accident.

Clearly, the respondent's actions in not so advising petitioner and in continuing to process petitioner's claim encouraged petitioner's reliance that his claim had been timely and properly filed under the FTCA. Certainly, genuine

issues of fact existed as to whether the statute of limitations had been tolled by these circumstances and the trial court's granting of the respondent's Motion for Summary Judgment was clearly erroneous in light of these factual issues.

CONCLUSION

Counsel for Petitioner, Rodney Mayeux, contends that the district court and appellate court erred in finding that the SAA was applicable to Petitioner's claim rather than the FTCA Counsel for Petitioner further contends that the district court erred in failing to toll the statute of limitations under the SAA and in granting Respondent's Motion for Summary Judgment thereby dismissing petitioner's claim. Counsel for Petitioner, Rodney Mayeux, requests that this Honorable Court grant a Writ of Certiorari to review the Judgment of the U.S. Fifth Circuit Court of Appeals in this matter.

Respectfully Submitted:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-31066
Summary Calendar

FILED
JUL 17 1998

RODNEY MAYEUX,

Plaintiff-Appellant,

versus

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant-Appellee.

. . . . . .

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 96-CV-1304-R

. . . . . .

Before WISDOM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:*

Rodney Mayeux his complaint under the Federal Tort

* Under 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except in the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Claims Act (FTCA). He appeals from the district court's dismissal of his complaint for lack of subject-matter jurisdiction. Finding no error, we affirm.

The United States, as a sovereign, is immune from suit unless it consents to be sued. *United States v. Mitchell,* 445 U.S. 535, 538 (1980). Both the FTCA and the Suits in Admiralty Act (SAA) waive sovereign immunity. The FTCA waives the Government's sovereign immunity from tort liability and provides a remedy against the United States for personal injury resulting from the negligence of its agents or employees. *See* 28 U.S.C. § 1346 (b). The FTCA does not apply to "[a]ny claim for which a remedy is provided by [the Public Vessels Act or the SAA], relating to claims or suits in admiralty against the United States." *See* 28 U.S.C. § (d). The FTCA and the SAA are mutually exclusive. Mayeux's assertion of jurisdiction under the FTCA is correct only if his claim is not covered by the SAA. *See McCormick v. United States,* 680 F.2d 345, 348 (5th Cir. 1982).

The SAA waives sovereign immunity of the United States not only in cases involving government vessels, property, or cargo, but also in cases in which a proceeding in admiralty could be maintained if a private person or property were involved. 46 U.S.C. app § 742; *see McCormick,* 680 F.2d at 349. The present case, in which the alleged negligence of a government employee caused injury in the navigable waters of the Harvey Canal, is a case covered by the SAA. *See McCormick,* 680 F.2d at 349. *See also De Bardeleben Marine Corp. v. United States,* 451 F.2d 140, 145 (5th Cir. 1971) (applying the SAA to a claim for negligent drafting of maritime survey charts); *Sheridan Trans. Co. v. United States,* 897 F.2d 795, 800 (5th Cir. 1990) (applying the SAA to a claim for failure

to give notice of submerged wreck). Mayeux's argument has no merit.

Suits filed under the SAA must be filed within two years of the time when the cause of action arises. *See* 46 U.S.C. app. § 745; *see McMahon v. United States,* 342 U.S. 25, 27 (1951). Mayeux's suit was filed on April 15, 1996, almost six months after the limitations period expired. Mayeux argues that his suit is not time-barred because of the doctrine of equitable tolling. We find that Mayeux did not allege any facts justifying the tolling of the statute of limitations.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RODNEY MAYEUX — CIVIL ACTION

VERSUS — NO. 96-1304

DEPARTMENT OF THE ARMY — SECTION "R" (2)
UNITED STATES CORPS OF ENGINEERS

FILED
SEP 26 1997

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the motion by defendant, Department of the Army, United States Corps of Engineers, for summary judgment. For the reasons set forth below, the motion is GRANTED.

I. BACKGROUND

This case arises from injuries that Rodney Mayeux allegedly suffered as a passenger on a small boat named the Minefish as it attempted to pass through the Harvey Canal Locks ("Locks"). Record Doc. No. 1, Complaint at ¶ V. The Harvey Canal is part of the Gulf Intracoastal Waterway, a body of water which runs from Florida to the Mexican border. (Def's. Mot. Summ. J., Aff. of Timothy J. Connell, Ex. 1.) The Locks, which are operated by the United States Army Corp of Engineers, connect the Mississippi River with the Gulf Intracoastal Waterway. *Id.*

DATE OF ENTRY SEP 26, 1997

Plaintiff alleges that on or about October 19, 1993, he was injured while traveling as a passenger on a boat passing through the Locks. Plaintiff explains that when the Minefish approached the Locks, its captain was informed by the Lock's operator that the boat had to wait until another vessel arrived to traverse the Locks. Complaint at ¶ VII. After waiting two hours, the Locks' operator instructed the Minefish to follow a tug and its tow of seven barges into the Locks. Plaintiff alleges that the Minefish's captain requested permission to proceed through the Locks after the tug and its tow had completed its journey through the Locks. Complaint at ¶ VIII. Plaintiff claims that the Locks' operator denied the captain's request and insisted that the Minefish proceed through the Locks with the tug. The operator of the Locks allegedly threatened to deny the Minefish passage if it did not advance with the tug. Complaint at ¶ VIII, IX. The captain acquiesced; the Minefish followed the tug into the Locks. While in the Locks, the Minefish allegedly became caught in the turbulence of the tug's powerful wake. The force of the wake tossed the smaller vessel, throwing plaintiff about the boat, allegedly causing him serious injuries. Complaint at ¶¶ X, XII.

On July 22, 1994, less than one year after the alleged incident, plaintiff sued the Louisiana Department of Transportation and Development ("DOTD") in the 24th Judicial District Court of Jefferson Parish. (Pl.'s Opp'n Mot. Summ. J., Ex. A.) Shortly thereafter, the DOTD informed plaintiff that the Locks were owned and operated by the federal government and not the state of Louisiana. (*Id.* At Ex. B & C.) Plaintiff accordingly filed an administrative claim with the Army Corps of Engineers on October 19, 1994. (Def's. Mot. Summ. J., Ex. 2.) Counsel for the Corps of Engineers

responded to plaintiff's claim in a letter dated November 1, 1994. (Def's. Mot. Summ. J., Letter of Friedrichs to Gutierrez, Ex. 3.) This letter explained that plaintiff's claim "appears to fall within the admiralty jurisdiction," and that the Secretary of the Army's authority to settle plaintiff's claim was "subject to a 2 - year limitation period" that could not be extended by "the assertion of a claim, correspondence, or negotiations relating thereto." (*Id.*) Plaintiff's claim proceeded through administrative channels. Finally, on April 15, 1996, approximately two and one-half years after the alleged accident, plaintiff filed this action asserting claims against the United States under the Federal Torts Claims Act.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is proper when the moving party shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Celotex v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmovant party, there is no genuine issue for trial." *Matsuashita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted); *United States v. Robinson,* 78 F.3d 172, 174 (5th Cir. 1996). To make this determination, the Court must view all evidence in the light most favorable to the nonmoving party. *See Nichols v. Loral Vought Sys. Corp.,* 81 F. 3d 38, 40 (5th Cir. 1996).

If the movant satisfies its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot rely on argument alone. Rather, the nonmoving party must direct the Court's attention to "specific facts indicating a genuine issue for trial exists." *ContiCommodity Servs., Inc. v. Ragan,* 63 F.3d 438, 441 (5th Cir. 1995); *International Shortstop, Inc. v. Rally's, Inc.,* 939 F. 2d 1257, 1263 (5th Cir. 1991). Moreover, mere conclusory allegations, speculation or conjecture are insufficient. *Douglass v. United Servs. Auto. Assoc.,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) ("[C]onclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden."). The nonmoving party must establish the existence of specific evidence in the record supporting elements essential to its claim. *Ragan,* 63 F.3d at 441; *International Shortstop, Inc.,* 939 F.2d at 1263.

III ANALYSIS

The United States argues that plaintiff's claim lies in admiralty and is therefore barred by the Suits in Admiralty Act's ("SAA's") two-year statute of limitations. *See* 46 U.S.C. §§ 740-45. Plaintiff contends his claim is nonmaritime in nature and therefore is governed by the Federal Tort Claims Act and its six-year limitations period. *See* 28 U.S.C. § 2401. Plaintiff alternatively argues that if the Court determines that this action lies in admiralty, the Court should toll the SAA's statute of limitations on equitable grounds and allow this case to proceed.

A. THE SUITS IN ADMIRALTY ACT

Plaintiff contends that his claim is actionable under the

Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 (b), 2671-2680. The FTCA acts as a waiver of sovereign immunity, allowing the federal government to be sued for its tortious conduct. The FTCA does not apply to "[a]ny claim for which a remedy is provided by [the Suits in Admiralty Act], 46 U.S.C. §§ 741-752." 28 U.S.C. § 2680 (d). Accordingly, plaintiff's claim is controlled by the FTCA only if his claim does not fall within the parameters of admiralty jurisdiction. McCormick v. United States, 680 F.2d 345, 348 (5th Cir. 1982) (en banc).

B. ADMIRALTY JURISDICTION

In 1948, Congress enacted the Extension of Admiralty Jurisdiction Act ("Extension Act"), which provides that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. The Act was designed to clarify the sometimes confusing boundary between land and water. *See Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). The Supreme Court has interpreted this language to hold that for a claim to invoke admiralty jurisdiction, it must satisfy both locality and relationship requirements. *Id.* This case easily meets this burden.

1. THE LOCATION REQUIREMENT

In analyzing the location requirement, a Court must assess an incident's factual characteristics to determine whether it occurred on navigable water for purposes of

admiralty jurisdiction. Plaintiff argues that since the operator who controlled the Locks performed his allegedly tortious action on land, this suit cannot satisfy the location requirement. Yet, strict adherence to the locality test has long been abandoned. Mechanical application of the requirement tended to create inconsistent results in conceptually analogous cases. *Kelly v. Smith*, 485 F.2d 520, 524 (5th Cir. 1973). Federal courts have therefore read Congress' expansion of admiralty jurisdiction in the Extension Act liberally. With the Extension Act, Congress expanded admiralty jurisdiction to include land-based injuries resulting from maritime accidents. 46 U.S.C. § 740; *see Kelly*, 485 F.2d at 525. In *Grubart*, the Supreme Court stated that if a land-based victim may properly assert a court's admiralty jurisdiction, "[s]urely a land-based . . . tortfeasor has no claim to supposedly more favorable treatment." *Grubart*, 513 U.S. at 545 (finding a land-based joint tortfeasor subject to admiralty jurisdiction). The Fifth Circuit has recognized that land-based actions resulting in maritime harm invoke admiralty jurisdiction. In *Kelly*, 485 F.2d 520, the Fifth Circuit held that deer poachers who were fired upon by defenders of a private hunting preserve as they attempted to flee by boat could sue their attackers in admiralty. *Id.* The Court explained that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters," *id.* at 526, even when the harm was caused by land-based actions. Accordingly, that the Lock's operator acted on land is not dispositive. If his actions caused injury to an individual participating in a traditional maritime activity, the claim can be governed by admiralty law. *See Dimaso v. United States*, No. 94 C 2597, 1995 WL 21609, *4 (N.D.Ill. 1995) (holding that the alleged negligent operation of locks from land was a maritime incident); *see also, Casaceli v. Martech*

International, Inc., 774 F.2d 1322, 1328 (5th Cir. 1985) ("A wrong that begins on land but results in harm on navigable waters may constitute a maritime tort."); *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983) (exercising admiralty jurisdiction over longshoreman's claim that he was injured on a vessel by a land-based crane).

2. RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY

The "connection" test requires the Court to assess the general features of the alleged incident to determine if it has a "potentially disruptive impact on maritime commerce." *Grubart*, 513 U.S. at 534; *Sission v. Ruby*, 497 U.S. 358, 363-64 and n. 2, 110 S. Ct. 2829; 111 L. Ed. 2d. 292 (1990). The Court must then determine whether " 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534, *quoting Sisson*, 497 U.S. at 364; *see Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118-19 (5th Cir. 1995). If an incident has both of these features, it is sufficiently related to maritime activity to fall within the federal courts' admiralty jurisdiction.

When analyzing the first prong of the relationship inquiry, the Court must consider the potential effects of the general features of the alleged incident rather than the results of the particular case. *Grubart*, 513 U.S. at 538. When the facts of this case are considered "at an intermediate level of possible generality," *id.*, the incident is clearly the type of event that could have a "potentially disruptive impact on maritime commerce." *Id.* at 539, *quoting Sisson*, 497 U.S. at 362. The negligent operation of locks connecting navigable

waters is undoubtedly "a potential hazard to maritime commerce." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 n. 5, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982). The incident alleged in this case therefore satisfies the first prong of the relationship requirement.

The second prong of the relationship question requires the Court to determine whether the general character of the activities in this case also bear a "substantial relationship to traditional maritime activity." *Grubart* 513 U.S. at 539. The Supreme Court has applied a very broad definition of traditional maritime activities. For example, in *Sisson*, the Court found that maintenance and storage of a pleasure boat at a marina substantially related to traditional maritime activity. *Sisson*, 497 U.S. at 367. In *Grubart*, the Court explained that insertion of pilings in a river was also linked to traditional maritime commerce. *Grubart*, 513 U.S. at 541. Considering the liberal meaning of maritime activities, the operation of locks between navigable waterways must be considered a maritime activity. *See Dimaso*, 1995 WL 21609 at *4 (holding that the negaligent operation of locks between navigable waters involved a traditional maritime activity).

Since the incident alleged in plaintiff's complaint occurred on the navigable waters of the United States, posed a potential hazard to maritime commerce, and was substantially related to traditional maritime activities, the claim is governed by admiralty law. Plaintiff's claim is therefore not cognizable under the FTCA. Instead, the allegations are governed by the SAA and its two-year statute of limitations.

C. TOLLING THE STATUTE OF LIMITATIONS.

Lawsuits brought pursuant to the Suites in Admiralty

Act must be brought "within two years after the cause of action arises." 46 U.S.C. § 745. Since the SAA operates as a waiver of the United States' sovereign immunity, substantial compliance with its provisions is insufficient. *See McMahon v. United States*, 342 U.S. 25, 27, 72 S. Ct. 17, 96 L. Ed. 26 (1951) ("[s]tatutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."); *Hebert v. United States*, 53 F.3d 720, 722 (5th Cir. 1995) (affirming dismissal of claim brought under the SAA since claimant did not exhaust administrative remedies). Lawsuits brought under the SAA must strictly adhere to the statute's limitations period. *See Kindrew v. United States*, 479 F.2d 49, 50 (5th Cir. 1973). Plaintiff was therefore required to file his lawsuit within two years from the date of his alleged injury. *McMahon*, 342 U.S. at 27 (SAA's limitation's period is computed from the date of the alleged injury). Yet, he did not initiate this suit until April 15, 1996 — almost six months after the expiration of the limitation period.

Plaintiff nonetheless asks the Court to toll the limitations period in this case. He claims that since he filed a complaint against the DOTD in state court and an administrative claim with the Army Corps of Engineers within the statutorily required period, which was not denied, the statute of limitation should be tolled.

The Fifth Circuit has held that a court may toll the SAA's limitation period provided it does not contradict the provision's legislative purpose of encouraging individuals with claims against the government to promptly and diligently present and pursue their claims. *McCormick*, 680 F.2d at 35-51; *Rashidi v. American President Lines*, 96 F.2d 124,

127 (5th Cir. 1996); accord, *Raziano v. United States*, 999 F.2d 1539, 1541 (11th Cir. 1993) (holding that SAA's limitation period is subject to aquitable tolling). But *see, Smith v. United States*, 873 F.2d 218, 222 (9th Cir. 1989) (classifying § 745 as "jurisdictional"); *Bovell v. United States Dep't of Defense*, 735 F.2d 755, 757 (3d Cir. 1984) (plaintiff cannot extend § 745 by filing an administrative claim); *Szyka v. United States Secretary of Defense*, 525 F.2d 62, 65 (2d Cir. 1975) (section 745 is not subject to waiver); *Williams v. United States*, 228 F.2d 129, 132 (4th Cir. 1955) (insanity cannot extend § 745). In general, equitable tolling is applied only when a plaintiff has actively pursued his case, but has filed a defective pleading, or was deceived into allowing the filing deadline to pass. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (affirming dismissal of employment discrimination action against the government that was not filed in a timely manner); *Wilson v. United States*, 23 F.3d 559, 561 (5th Cir. 1994) ("Federal courts have allowed equitable tolling only sparingly."). The period will not be tolled by simply filing an administrative claim, *see Rashidi*, 96 F.3d at 127, or by the mistaken belief that the another statute governed the claim. *Favorite v. Marine Personnel and Provisioning*, 955 F.2d 382 (5th Cir. 1992) (plaintiff's mistaken belief that his case was governed by the Jones Act's three-year limitations period rather than the SAA's two year period was not grounds for equitable tolling)

Plaintiff argues that the Court should toll the limitations period since he was induced by the government not to pursue his claim. Plaintiff asserts that the government's failure to definitively rule on his administrative claim prompted his inaction. This argument is without merit here.

The government did not take any action to deceive or lull plaintiff. To the contrary, the Corp of Engineers notified plaintiff that his claim "appears to fall within the admiralty jurisdiction," and that "a 2 - year limitation period" applied to the Army's settlement authority that could not be extended by negotiations or the assertion of an administrative claim. (Def.'s Mot. Summ. J., Letter of Friedrichs to Gutierrez, Ex. 3.) Further, as the court in *Raziano v. United States* explained, the government's knowledge of a potential claim acquired in pre-suit settlement negotiations is not grounds for estoppel. *Raziano*, 999 F.2d at 1541. In *Raziano*, the Eleventh Circuit rejected a request to toll the SSA's statute of limitations for the period that the plaintiffs were in negotiations with the Coast Guard. *Id.* The court reasoned that without evidence of inducement or trickery, there was no justification for tolling the limitations period. Far from misleading plaintiff in this case, the government warned plaintiff that he needed to pursue his claim diligently.

Plaintiff also argues that the period of limitations should be tolled since he filed a defective pleading within the statutorily required period. While courts sometimes toll limitations periods if parties pursue their claims incorrectly, this exception is usually applied only when a plaintiff sues the proper defendant in a procedurally incorrect manner. *See Wilson*, 23 F. 3d at 561 (explaining that doctrine of relation back is permitted only when the proper defendant is already before the court). Here, plaintiff filed its defective pleading not only in the wrong court, but also against the wrong party. *Id.* (refusing to toll the SAA limitations period despite plaintiff's claim that he was unaware that the government, and not the party he sued, was the owner of the vessel on which he was injured). Although his action in state court

demonstrates a good faith attempt to pursue his claim promptly, plaintiff still had a lengthy opportunity to correct this error. The DOTD informed him that the Corps of Engineers operated the Locks only eleven months after the alleged accident. Plaintiff still had almost thirteen months to pursue his claim against the correct party. His failure to do so is his own error, which the Court is not bound to correct. *Id.* (refusing to apply equitable tolling since the plaintiff discovered the government was the proper defendant over five months before the expiration of the limitations period).

Failure to diligently pursue a case does not compel equitable relief. "[T]he principles of equitable tolling . . . do no extend to what is at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 96 (affirming dismissal of employment discrimination action against the government that was not filed in a timely manner). When a plaintiff has "ample time and opportunity to bring suit within the statutory period, enlarging the limitations period would defeat the SAA's legislative purpose." *Rashidi*, 96 F.2d at 127. Failure to exercise due diligence in preserving legal rights is an insufficient reason to toll the applicable statutes of limitations. *See Favorite*, 955 F.2d 382, 389 (5th Cir. 1992). The Court will not toll the statute of limitations in this case.

Since plaintiff's claim lies in admiralty and was not filed within the SAA's statutorily required two-year period of limitations, the government's motion for summary judgment is **GRANTED.** Accordingly,

IT IS ORDERED that the defendant's motion for summary Judgment is hereby **GRANTED**. Plaintiff's claim is hereby **DISMISSED.**

New Orleans, Louisiana, this 24th day of September, 1997.

/s/ Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
1997 SEPT 26

RODNEY MAYEUX,	CIVIL ACTION
VERSUS	NO. 96-1304
DEPARTMENT OF THE ARMY UNITED STATES CORPS OF ENGINEERS,	SECTION: R

J U D G M E N T

Considering the written order of the Court on file herein.

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint is hereby dismissed.

New Orleans, Louisiana this 26th day of September, 1997.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY SEP 26 1997